

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD ARRAND and LINDA ARRAND,

Plaintiffs-Appellants,

v

DR ALAN SNIDER, DO,
HERRICK MEMORIAL HOSPITAL,
PROMEDICA HEALTH SYSTEM,
and LENAWEE HEALTH ALLIANCE,

Defendants-Appellees.

UNPUBLISHED

July 14, 2005

No. 260386

Lenawee Circuit Court

LC No. 04-001671-NH

Before: O’Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court’s grant of summary disposition in favor of defendants in this medical malpractice action.¹ We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

On August 20, 2004, plaintiff Richard Arrand filed a medical malpractice claim against defendants² alleging that defendant Snider improperly performed surgery on his left wrist on February 21, 2002. In support of his claim, plaintiff maintains that he obtained a signed and sworn affidavit from Arnold P. Charnley, M.D., on August 19, 2004. The affidavit was allegedly taken to Charnley’s office on August 19, 2004, by an attorney performing contract work for

¹ The trial court’s final order does not state the ground upon which summary disposition was entered. However, the trial court essentially found that plaintiffs’ claims were time barred by the applicable statute of limitations due to plaintiffs’ failure to timely file an affidavit of merit pursuant to MCL 600.2912d. We thus treat the grant of summary disposition as one entered under MCR 2.116(C)(7). See *Young v Sellers*, 254 Mich App 447, 449; 657 NW2d 555 (2002).

² Because plaintiff Linda Arrand’s concurrent loss of consortium claim is derivative, we refer to Richard Arrand as plaintiff in the remainder of this opinion.

plaintiff's regular attorney. The contract attorney maintained that she then personally took the complaint, the affidavit, and the filing fee to the Lenawee County Circuit Court for filing on August 20, 2004. She did not, however, make a copy of the signed affidavit of merit for plaintiff's own files, nor did she obtain a time-stamped copy of the filed documents. A copy of the summons and complaint, apparently among the documents returned by the trial court, was later mailed to defendants on August 24, 2004. According to both attorneys, no one noticed that the documents sent to defendants did not contain a copy of the affidavit, because the secretary who sent the documents did not have an attorney review them. Plaintiff maintains that the affidavit of merit was separated from the complaint after it was filed and was misplaced or lost by the trial court while it was being processed.

Defendants moved for summary disposition, seeking to have the case dismissed due to the failure to submit an affidavit of merit with the complaint as required by MCL 600.2912d. In response, plaintiff presented affidavits concerning the circumstances surrounding the signing and alleged filing of the initial affidavit of merit and a "replacement" affidavit signed by Dr. Charnley. Plaintiff argued that the trial court should correct the clerical mistake made by the court personnel and allow the case to proceed.

After a hearing in which contract counsel provided an explanation of the events, the trial court found that plaintiff's explanation was unreasonable. The trial court noted the lack of any copies of the initial affidavit and found that, while the contract attorney might have in good faith believed she filed the affidavit, it was never filed. The trial court granted defendants' motion and dismissed plaintiff's complaint with prejudice.

II. STANDARD OF REVIEW

We review a trial court's rulings on a motion for summary disposition motions de novo. See *Neal v Wilkes*, 470 Mich 661, 664; 685 NW2d 648 (2004).

III. ANALYSIS

Pursuant to *Scarsella v Pollak*, 461 Mich 547, 550; 607 NW2d 711 (2000), and *Young v Sellers*, 254 Mich App 447, 452-453; 657 NW2d 555 (2002), the failure to timely file a complaint and an affidavit of merit will not toll the applicable limitation period. This is true even when the failure to file an affidavit of merit arises from an inadvertent clerical error on the part of plaintiff's counsel. *Young, supra*. However, plaintiff maintains that, where a proper affidavit of merit was completed and signed by a qualified physician and taken to the circuit court for filing with the complaint, but was lost or misplaced by court personnel, dismissal is unwarranted.

The combination of errors admitted by plaintiff's attorneys, coupled with the glaring omission of any real evidence of the existence of a timely affidavit of merit, is fatal to plaintiff's claim. Plaintiff's attorneys acknowledged that they did not copy the initial affidavit, did not obtain a time-stamped copy of the pleadings when they were filed, and did not check to see whether the affidavit of merit was among the papers returned to them before they sent the papers to defendants. We note that even Dr. Charnley's "replacement" affidavit contains an error—neither his signature nor the notarization is dated. In short, plaintiff can produce no evidence that the initial affidavit existed, much less any evidence that the trial court misplaced the affidavit.

We thus find that the trial court did not err when it granted defendants' motion for summary disposition. *Young, supra*.

Affirmed.

/s/ Peter D. O'Connell

/s/ Bill Schuette

/s/ Stephen L. Borrello